United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 76-4046

United States Court of Appeals
FOR THE SECOND CIRCUIT

CARRIER AIR CONDITIONING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,
Intervenor.

On Petition to Review an Order of the National Labor Relations Board

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BRIEF FOR AIR-CONDITIONING AND REFRIGERATION INSTITUTE, AIR MOVING AND CONDITIONING ASSOCIATION, AMERICAN BOILER MANUFACTURERS ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, ASSOCIATED BUILDERS AND CONTRACTORS, INC., NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS

The *amici curiae* will address the following questions:

1. Does a union violate section 8(e) and section 8(b)(4)(B) of the National Labor Relations Act ("NLRA") when it invokes the refusal to deal provisions of a collective bargaining agreement to prevent

a contractor from installing products which are made by another company which is not a party to the collective bargaining contract with the union and the selection of which is not controlled by an employer with whom the union has a contract?

2. In interpreting sections 8(e) and 8(b)(4)(B) of the National Labor Relations Act as applied to an agreement between a local sheet metal workers union in New York City and a group of contractors whereby the contractors promised not to install products containing fabricated sheet metal unless certain of the fabrication was performed by one of themselves and only then if performed within the New York City area, did the National Labor Relations Board err in failing to adopt the construction which would harmonize these restrictions with the Sherman Antitrust Act?

3. In considering whether the conduct of the union in enforcing the collective refusal to deal violated sections 8(e) and 8(b)(4)(B) of the Act, did the Board err in failing to adopt the construction which would harmonize these sections with the National Productivity and Quality of Working Life Act of 1975?

I. INTEREST OF THE AMICI CURIAE

Upon stipulation of the parties,[1] this brief is submitted, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, on behalf of Air-Conditioning and Refrigeration Institute, Air Moving and Conditioning Association, American Boiler Manufacturers Association, American Consulting Engineers Council, Architectural Woodwork Institute, Associated Builders and Contractors, Inc., National Society of Professional Engineers, and National

[1] The Board, Carrier and Local 28 have consented to the filing of this brief by the *amici curiae*. A stipulation to that effect has been filed with the Court.

Woodwork Manufacturers Association, as *amici curiae*. The *amici* support the position of the petitioner, Carrier Air Conditioning Company, in urging that the decision of the National Labor Relations Board dismissing the complaint in this case be reversed.

The associations participating in this brief represent a broad cross-section of the manufacturers, designers, specifiers and installers of products and materials used in construction throughout the United States. They have participated individually and jointly in numerous cases before the National Labor Relations Board and the federal courts presenting issues relating to the legality of boycotts of prefabricated products in the construction industry. For example, they participated jointly as *amici curiae* both by brief and oral argument before the court of appeals in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975), a case which reversed the Board and held that contractual enforcement procedures (such as those in the instant case) to further product boyotts are not permitted by the NLRA. Despite the Ninth Circuit's ruling, however, the Board relied upon its holding in *Associated General Contractors of California, Inc.*[2] in dismissing the charges against Local 28 in the instant case. Accordingly, the *amici* have an interest in, and are directly familiar with, the issues involved herein.

The associations joining herein participated as *amici curiae* before the Supreme Court in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975), and before the NLRB and courts of appeals in a number of cases involving construction industry boycotts and the Board's application of its so-called "right to control" test to such situations. E.g.,

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[2] *Southern California Pipe Trades District Council No. 16 of the United Association, et al. (Associated General Contractors of California, Inc.)*, 207 NLRB 698 (1973).

Local 438, United Ass'n, 201 NLRB 59 (1973), enf'd sub nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F2d 323 (4th Cir. 1973); *United Brotherhood of Carpenters, etc., Local 112 (Summit Valley Industries, Inc.)*, 217 NLRB No. 129, 89 LRRM 1799 (1975), petition for review and cross-application for enforcement pending in Case No. 75-2064 (9th Cir.); *Local 638, Plumbers and Pipefitters, Enterprise Ass'n (The Austin Co.)* v. *N.L.R.B.*, 521 F.2d 885 (D.C. Cir. 1975), petition for certiorari granted —— U.S. ——, 44 U.S.L.W. 3462 (1976). In the latter case, they were granted permission to file a brief as *amici curiae* in support of the Board's petition for a writ of certiorari, and will also file a brief on the merits.

While the *amici* thus have a substantial common interest in the issues presented in this case, they have varying economic stakes in the outcome of these proceedings. The interest of each of the *amici* is set forth below.

A. The Air-Conditioning and Refrigeration Institute (ARI)

ARI is a national trade association consisting of approximately 175 manufacturing companies in the air-conditioning and refrigeration industry. These companies are the principal manufacturers of the end-products and components in this industry, which has a total volume annually in excess of $3.4 billion. Plants of ARI members are located throughout the United States and the air-conditioning and refrigeration equipment they manufacture is sold and shipped to every state and to foreign countries.

Among the end-products manufactured by ARI's members and certain others are so-called "packaged" equipment. These are products which are manufactured, assembled, and by necessity tested for safety and efficiency at the factory, and then shipped to the job site for in-

stallation in a residence, apartment house, office building, factory or commercial establishment. Units of this type are the subject of Local 28's boycott here against Carrier.

ARI members have a substantial and long-standing interest in the development of the law concerning product boycotts, since the freedom to install their products on construction sites is essential to the orderly distribution of such products. Frequently they have been involved in attempts by unions to prevent installation of their products, including instances which were the subject of litigation before the Board and the courts. See, e.g., *Local 636, United Association (Mechanical Contractors Association of Detroit, Inc.)*, 177 NLRB 189, rev'd. *Local Union No. 636, United Association* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *Local 636, United Association*, 189 NLRB 661 (1971).

B. Air Moving and Conditioning Association, Inc. (AMCA)

AMCA is an international trade association comprised of companies manufacturing fans and other air moving devices used in industrial and commercial ventilating and air-conditioning systems. An affiliated division includes manufacturers of louvers, dampers and shutters. The total membership includes 67 U. S. manufacturers. Products which they produce are valued at approximately $200,000,000 annually. The Association owns and operates its own testing laboratory at its headquarters in Arlington Heights, Illinois.

The principal activities of AMCA include the promulgation of performance test standards for its products and the administration of certification programs covering published performance ratings. These programs are designed to insure that the user gets the performance from a product which is claimed by its published ratings. For the program to be effective, it is essential that the

purchaser or his agent has the right to select the equipment which, in his judgment, is best suited for his use. Consequently, any unnecessary or unwarranted restrictions on that right are of great concern to AMCA and its members.

C. American Boiler Manufacturers Association (ABMA)

ABMA is a trade association composed of 87 member companies engaged in the manufacture and sale of primary heat and power generating equipment, fuel burning systems, and air pollution control systems. These companies, which are located throughout the United States, are the principal manufacturers of packaged boilers and components. A packaged boiler is a complete, prefabricated, steam-generating unit. It requires no further fabrication work after it leaves the factory; it need only be installed at the place of operation. Packaged boilers are made in factories utilizing assembly-line production methods and employing trained specialists. Almost all are shop-tested and inspected prior to shipment, warranted against defects, and bear an Underwriters Laboratory Seal indicating conformance with specified standards.

ABMA members have manufactured packaged boilers since 1932. Their annual production of such boilers now exceeds $100,000,000 annually. The increased demand for their products in recent years is responsive to many factors, including, a unit design which assures better quality and greater efficiency, a lower price, and the fact of single-manufacturer responsibility for defects and malfunctioning.

Some of ABMA's efforts to combat boycotts against packaged boilers are set out in *ABMA* v. *N.L.R.B.*, 404 F.2d 547 and 404 F.2d 556 (8th Cir., 1968), cert. den. 398 U.S. 960 (1970).

D. American Consulting Engineers Council (ACEC)

ACEC is a federation of state and regional associations comprising some 2,600 independent engineering firms. These firms range from highly specialized sole proprietors to large, multioffice general practitioners. The firms represent more than 7,000 legally registered (in accord with state laws) principals and partners, plus more than $40,000 engineering technicians and other employees.

Consulting engineering is a $3 billion per year U. S. industry. Firms design: airports, bridges, dams, harbors, parks, power plants, stadia, waste treatment plants and similar facilities worth $35 billion.

The objectives of the ACEC include: protection of public interest, expansion of engineering technology, improvement of the standards of consulting engineering practice and advancement of the engineering professional in general. Member companies must observe high professional and ethical standards and are prohibited from maintaining any commercial, manufacturing or other affiliation which might influence the selection or specification of equipment, methods or materials used on their projects. In carrying out these objectives, ACEC has frequently experienced the adverse effect of union restrictions on the use of new and improved products and technology.

E. Architectural Woodwork Institute (AWI)

AWI is a national trade association of 380 manufacturers and distributors of architectural woodwork. Products of its members consist of a wide variety of precut, prefit or preassembled items or materials, such as beams, special windows, doors, wall paneling, cabinet work and all forms of custom mill work for architectural and aesthetic purposes, used in homes, public buildings,

schools and churches. The total volume of such products produced by AWI members approximates $150,000,000 annually.

Building trades unions have frequently hampered the sale and distribution of products of the type manufactured by AWI members. Consequently, AWI is deeply concerned about the development and implementation of laws dealing with eliminating restrictions on use and installation of the products manufactured by its members.

F. Associated Builders and Contractors, Inc. (ABC)

ABC is a nonprofit incorporated association with over 7,000 member firms who are largely construction contractors and firms who do business with the contract construction industry. The value of construction work performed by its members exceeds $4,000,000,000 annually.

ABC members have frequently encountered problems in connection with efforts of building trades unions to prevent the installation of factory made components despite the contractors' lack of control over such components.

G. National Society of Professional Engineers (NSPE)

NSPE is composed of 67,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately 500 local chapters. The members are involved in all fields of engineering practice and all branches of engineering.

Approximately 13,000 of the Society members are engaged in the private practice of engineering and will be particularly and seriously affected by any change in the law applicable to product boycotts which diminishes their right to specify certain products and equipment for projects.

Also, many members of the Society are engaged in engineering activity for industry and for federal, state and local governments and have a substantial interest as representatives of clients of engineers in private practice on the issue before the Court.

The NSPE was organized in 1934 for the "advancement of the public welfare and the promotion of the professional, social and economic interests of the engineering profession" and in accordance with that purpose has actively participated in the development and enactment of labor legislation affecting the interests of engineers and has participated in cases involving engineers before the Board as *amicus curiae*.

H. National Woodwork Manufacturers Association (NWMA)

NWMA actively represents the interests of wood door, window and millwork manufacturers. Its membership currently includes approximately 90 manufacturers and 20 associates who are suppliers to the industry. Their production represents the majority of wood windows and doors made in the United States and amounts to approximately $300,000,000 annually.

NWMA members deal with all members of the construction team: the architect, the supplier, and the builder. They are well versed in all areas of building and component costs involved. Their products are used in all types of construction, including private, single-family homes; government project housing; apartment housing; and commercial buildings. The primary concern had been the manufacture of high quality products at reasonable prices.

NWMA's interest in union restrictions on use of manufactured products on construction sites is exemplified by its role as charging party in the proceedings which culminated in the decision of the U. S. Supreme Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

STATEMENT

This case involves the validity of the refusal to deal provisions of an agreement between Local 28 and the New York City Chapter of the Sheet Metal and Air Conditioning Contractors National Association ("SMACNA") and the validity of the restraints imposed by Local 28 in enforcement of these provisions. These provisions are embodied in Addendum B, Part II, entitled "Memorandum Containing No Subcontracting Clause", which reads as follows (D&O 4):[3]

> For the preservation of the work opportunities of the journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit, each Employer within the collective bargaining unit shall not subcontract out any item or items of work described hereinbelow; except that each said Employer shall have the right to subcontract for the manufacture, fabrication or installation of such work with any other Employer within the collective bargaining unit:
>
> 1. Radiator enclosures except when manufactured and sold as a unit including heating element.
> 2. Functional louvers.
> 3. Attenuation boxes except for mechanical devices contained therewith.
> 3a. Sound traps.
> 4. Dampers: All types of Dampers, including Automatic Dampers and multi-Zone Dampers, Manual Control Dampers and Fire Control Dampers, except Patented Pressure Reducing Devices. OBD's and Santrols are per sketches B and C annexed hereto.

[3] "D&O" references are to pages of the Board's decision and order in this case, reported at 222 NLRB No. 110. "JD" references are to pages of the Administrative Law Judge's decision attached thereto.

5. Skylights, Sheet Metal Sleeves, Pressure Reducing Boxes, Volume Control Boxes, Troffers (plenums), High Pressure Fittings and Gutters (excluding ½ Round Gutters).

6. Air handling units in excess of 30,000 C.F.M.'s.

7. All other work historically, traditionally and customarily performed by journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement.

All the work described in this "no-subcontracting clause" shall be performed by journeyman and/or apprentice sheet metal workers in the bargaining unit covered by this agreement.

While the article is couched in the language of subcontracting, its scope is far broader. The article represents a promise among businessmen and with Local 28 that none of the businessmen will purchase any of the listed products from any supplier who is not one of their group. This article was intended to keep certain products off the New York construction market unless fabricated by one of the signatory companies in a New York City facility. It was so applied to Petitioner Carrier's Moduline air conditioning units.

The actions of Local 28 to effectuate the concerted refusal to deal included: (1) invoking the grievance machinery of the same contract against one of its parties, General Sheet Metal, Inc. ("General") to preclude it from installing Moduline units (D&O 9-10, JD 18-19, 21);[4] (2) adopting a resolution whereby the members of the Union refused to grant the Moduline units an exception

[4] A detailed description of the pertinent facts is given at pages 5 through 27 of Petitioner's brief.

to the refusal to deal (D&O 7, 10-11, JD 10); (3) preventing a sheet metal subcontractor from including Moduline units in the blueprints of one of its jobs, and by the refusal of a union member who worked for that subcontractor to refuse to draw in the units (D&O 8, 13, JD 5, 10).

The effect of the agreement to refuse to deal was the near total exclusion of Moduline units from the New York market. A few exceptions were made:

(1) *The Presbyterian Hospital and the Carrier Company Office Jobs (early 1967)*—Contractors were allowed to install Moduline units on these two projects in return for Carrier's promise that it would redesign its product so that the plenum could be both made and mated outside its specialized facility, and would be made and mated for New York City jobs by members of the SMACNA (D&O 5, JD 3-4)

(2) *The Police Office Job (late 1967)*—A contractor was permitted to install Moduline units at a single project because Carrier designed the plenums specifically for separate manufacture; had them manufactured in New York City at the plant of a SMACNA member, and had them mated with control portions at the jobsite by another SMACNA member. That method of manufacture and assembly soon cost Carrier an extra $10,000 to correct the defects caused by the process of manufacturing and mating outside Carrier's own specialized facilities (D&O 6, JD 4, 6-7, 22).

(3) *The Van Etten Drug Treatment Center Job (1974)*—A contractor was allowed to install Moduline units on this project in return for a promise by Carrier to delay filing an unfair labor practice charge against Local 28 until after an upcoming union election (D&O 8-9).

(4) *The Babies Hospital Addition to Presbyterian Hospital Job 1975*—A contractor was able to install Mod-

uline units on this project after paying $2,153.60 to Local 28 for its "Sick Dues Relief Fund"—an amount said to represent what Local 28 members would have earned if the fabrication work had been performed by them (D&O 9-10, JD 18-19, 21).

The National Labor Relations Board overturned the decision of the ALJ who held that the refusal-to-deal article and its enforcement violated the Act. Accordingly, the Board dismissed the complaint. 222 N.L.R.B. No. 110.

The Board came to its conclusion, as it had in its *Associated General Contractors* decision, *supra* p. 3, n. 2, on the basis of a mistaken assumption that a union may, without running afoul of section 8(e) or 8(b)(4)(b) of the Act, enforce provisions of a labor contract prohibiting signatory employers from handling or installing prefabricated products, regardless of "secondary-primary employer [or] work preservation" considerations,[5] so long as the union's enforcement efforts are confined to "peaceful means." [6] As in *Associated General Contractors*, the Board considered dispositive that the union had relied exclusively on "peaceful" and "non-coercive" contract enforcement procedures. Accordingly, it did not overturn, but disregarded, the Administrative Law Judge's findings that: (1) the Union's conduct was undertaken with an illegal secondary object; (2) the "tactical object" of the Union's application of the "said clauses in the contracts of Local 28 [was] *not to preserve work* for its members . . . "; and (3) "the construction industry proviso to Section 8(3) of the Act is *not applicable* . . ." (JD 20-23, emphasis added).

It is submitted that the Board has ignored the intent of Congress by allowing the Union, in cooperation with

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[5] *Associated General Contractors, supra,* 207 NLRB at 700.

[6] *Id.* at 699.

a group of employers, to impose an obligation upon members of the employer group to be the instrument of a boycott against goods manufactured, purchased and specified by other, wholly independent persons. Moreover, an employer's agreement to assign all work of a particular type to his own employees can only be held to apply to work which is within his power to assign. Any attempt to extend this obligation further to affect work exclusively controlled by others is necessarily secondary.

Further, the Board erred in approving such an application of the parties' agreement without considering whether that agreement, as so applied, would fall within any exception to the prohibition contained in section 8(e) of the Act.

In addition, a manufacturer who has no duty to bargain with a union over its work restriction objectives cannot lawfully be pressured as in this case, when the union justifies its conduct by reliance upon a contract to which the manufacturer is not a party.

The Board's ruling in this case invites unions in the construction industry to strike bargains with associations of contractors to impose new impediments to the use of manufactured and prefabricated products in construction, with a resulting destructive impact upon that industry and the economy as a whole. Moreover, the Board would allow such tactics to be employed in a manner which, under well-settled law, is "unmistakably and flagrantly secondary".[7] The Board's holding in this case should be rejected by the Court.

The rule announced by the Board in this case would allow restraints on the selection of products and services

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[7] *N.L.R.B.* v. *Local 825 Operating Engineers (Burns and Roe, Inc.)*, 400 U.S. 297, 304 (1971).

which Congress clearly sought to prohibit through the secondary boycott restrictions in sections 8(b)(4) and 8(e) of the Act. The Board's conclusion that monetary fines, censure, and other contract penalties to enforce a product boycott do not "coerce or restrain" the employer against whom they are imposed is contrary to both practical realities and settled law. It is a conclusion which also flies in the face of the Board's duty to harmonize the NLRA with the antitrust laws and the National Productivity and Quality of Working Life Act.

The case is before this Court upon a petition for review of the Board's decision filed pursuant to section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) by the Carrier Air Conditioning Company, the charging party before the Board. No question of jurisdiction is presented.

ARGUMENT

The Board's decision in this case, if enforced by the Court, would enable unions to impose by means of fines and other contract penalties precisely the sort of boycotts which the Board has long and properly held that they are precluded from imposing by use of other forms of pressure. It would permit the unions to combine with groups of employers to compel neutral subcontractors to cease doing business with, or otherwise to bring pressure upon, general contractors, project owners, engineers, architects and others involved in construction projects in an effort to prevent the use of prefabricated products and to force a resort to less satisfactory jobsite methods. The Board's decision would allow this result, without regard to whether the union's tactics were "primary" or "secondary" or whether the union could establish a legitimate "work preservation" objective.

This holding is in conflict with the Congressional purpose to prevent secondary boycotts, as set out in the Labor Management Relations Act of 1947 and the amendments included in Title VII of the Labor-Management Reporting and Disclosure Act of 1959. It poses a potentially serious threat to the construction industry and the economy in general.

I. The Refusal to Deal Article of the Contract Violates Section 8(e) Because of Its Secondary Objective

When a SMACNA employer obliged himself to refuse to deal by the "work preservation" article of the contract with Local 28 he did not: (a) promise to assign any work to his own employees; or (b) promise that he would direct that work covered by the article would be performed on his own jobsites. Consistent with that article he could assign all his sheet metal work to be done by other members of SMACNA, and could direct that none of it be done on his own jobsites. What he could not do is assign any such work to employers not party to the contract with Local 28. Those are the unmistakable marks, not of intent to preserve work for his own employees, but to fence out companies, located in New York and elsewhere, who do not employ workers who are members of Local 28.

Neither Local 28 nor SMACNA ever claimed that the refusal to deal provision was to be given any other meaning. Indeed, Local 28, with SMACNA's acquiescence, consistently applied the provision to achieve its objectives against Carrier, which was not a member of SMACNA, whose Moduline plant was not in New York City, and which was not organized by Local 28. The objective of Local 28's boycott against Carrier is not in dispute: It sought to force Carrier to change the

design and method of manufacture of its products so as to transfer sheet metal work from Carrier's plant in Tyler, Texas to SMACNA facilities in New York City. The SMACNA members were in accord.

A. *The Union's Tactical Objective of Changing Carrier's Design and Method of Manufacture of Its Products Is A Secondary Objective Rendering the Refusal to Deal Unlawful.*

The tactical objective of the Union's pressure on Three Boro and General was to force a change in the design and method of manufacture of Carrier's product. Carrier is an employer who had no contractual or bargaining obligations with the Local 28. To achieve this object, Local 28 enforced a refusal to deal against subcontractors, thereby making it sufficiently unprofitable for subcontractors to accept work on jobs where Carrier prefabricated products were used. The Union thus sought to make the subcontractors its allies, willing or unwilling, (see *infra*, pp. 31-32) in an effort to discourage builders, architects, engineers and others in the construction industry from purchasing or specifying such products. Thus, the Union used its contractual relationships with subcontractors throughout the region as a lever to force policy changes by other independent business entities with whom the Union had no contracts. As the Union's objectives were to influence some person other than "their own employer," the Union's conduct toward Three Boro and General was secondary and therefore illegal. See *National Woodwork*, *supra*, 386 U.S. at 641, 643. The Board concluded that, because it found the Union's enforcement of its SMACNA contract against the subcontractors was not coercive (D&O 11-12) it did not have to determine whether the Union had illegally directed its contract enforcement efforts against "secondary" employers (D&O 13).

The Board's failure here, as in *AGC of California*, to consider the primary-secondary employer and work preservation issues, was clear error. Indeed, the Board should have considered these issues *first*, before deciding whether the enforcement of the clauses constituted prohibited restraint or coercion. For whatever justification there may be for fines and other penalties pursuant to a valid contract it is totally extinguished if the union's interpretation of the contract clause relied on is itself illegal, and therefore "unenforceable and void" under the express language of section 8(e).

The Board's error seems to originate in its misreading of *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1964) and *Connell Construction Co. Inc.* v. *Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975). *National Woodwork* held that while a literal reading of sections 8(e) and 8(b)(4)(B) would prohibit all "work preservation" clauses, the legislative history indicated an intent not to prohibit a work preservation clause which was clearly "primary" in its objective, i.e., one in which the *employees* of an employer require him to assign to them work which he had the right to assign and which was of the kind which those employees had traditionally performed. As the Court explained (386 U.S. at 635):

> This loophole-closing measure likewise did not expand the type of conduct which § 8(b)(4)(A) condemned. Although the language of § 8(e) is sweeping, it closely tracks that of § 8(b)(4)(A), and just as the latter and its successor § 8(b)(4)(B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, § 8(e) does not prohibit agreements made and maintained for that purpose.

The Court made equally plain the test for determining when activity was primary and therefore impliedly

excepted from the prohibition of sections 8(e) and 8(b)(4)(B), as follows (386 U.S. at 645):

> There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. [footnote omitted] The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees.

Thus, had the Board examined the issue of the validity *vel non* of the refusal to deal under section 8(e), it could not have found it within the *National Woodwork* exception for primary object work preservation. The refusal to deal provisions of the SMACNA-Local 28 contract do not constitute a promise by any employer to assign any work at all to his own employees. An employer can be in full compliance with these provisions even if he assigns all his sheet metal work to other employers. What the clause does is to confine his selection of assignees to those other members of his trade association whose employees are represented by Local 28. That is clearly outside the primary object implied exception described in *National Woodwork*. Any doubt on that question was laid to rest in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters, Local 1000*, 421 U.S. 616 (1975) holding unlawful under the Sherman Act an agreement between a contractor and a plumbers local whereby the contractor promised to assign his mechanical work only to subcontractors whose employees were represented by the local. The Court necessarily decided that the conduct also violated sections 8(e) and 8(b)(4)(B) of the NLRA in rejecting the union's argument that the conduct was shielded by the "construc-

tion industry" proviso to section 8(e). The Court made clear that this proviso was designed to apply only to collective bargaining agreements restricting an employer's assignment of work as between his own employees and his subcontractors, and even then, only with regard to work to be done at a particular job site. The court stated (421 U.S. at 633):

> These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well. [Footnotes omitted]

Thus, had the Board understood *National Woodwork* and *Connell Construction Co.*, it could not have premised its analysis on the validity *vel non* of the refusal-to-deal article.

B. *The Union's Application of Pressure To Contractors Not Having Control of the Work Evidences a Secondary Objective Rendering the Union's Conduct Unlawful.*

The Administrative Law Judge observed that Local 28's secondary intent was manifested by the fact that it directed its pressure at subcontractors who had no authority to resolve the Union's demands. Inasmuch as the subcontractors' lack of control over this dispute is

established by the record in this case and was considered in the Judge's analysis, the *amici curiae*, who have a long-standing interest in this issue, believe that this Court would be assisted by an explanation of how, in the context of this case, the "right-to-control" factor relates to the legislative scheme of sections 8(e) and 8(b)(4)(B).

The architects and engineers for the Van Etten Drug Treatment Center project and the Babies Hospital project were vested by the project owners with exclusive authority to specify air conditioning units. They specified Carrier Moduline units. The subcontractors, Three Boro and General, had no right to select or not to select those units, and no discretion under their subcontracting agreements to change the specification or installation methods designed for those products. The Administrative Law Judge found that these subcontractors had no "right of control" over the type of unit or its composition to be used on these jobs (JD 21). Accordingly, the Judge found that Local 28 had no lawful right to insist that General fabricate the plenums, . . ." (JD 21).

The Board has consistently held, now with the approval of the Fourth and Ninth Circuits, that a *National Woodwork* exception is generally not applicable where the employer against whom a union enforces "work preservation" requirements lacks the right-to-control the assignment of the work the union seeks. *Local No. 438, United Ass'n (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enf'd sub. nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973); *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 533 (9th Cir. 1975). For where control of the work is vested in someone other than the immediate employer, enforcement of the agreement presumptively "evinces the unions' intention to press their objectives elsewhere' . . ." *George Koch Sons, Inc.* v.

N.L.R.B., 490 F.2d 323 (4th Cir. 1973). This is necessarily so, because a "union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign. When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective." *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 438. Additionally, a union may not validly advance a work preservation claim against an employer with whom the union has no collective bargaining relationship, and whose employees the union does not seek to represent. *George Koch Sons, Inc.*, *supra*, 490 F.2d at 327.

The Board and court decisions in *Koch* and *AGC of California* indicate that the right to control doctrine is to be realistically applied. Thus, it is not to be extended to protect an employer who intentionally divests himself of his potential for control, or who conspires with his immediate contractor to create the appearance of no control. *George Koch Sons*, *supra*, 490 F.2d at 327; *AGC of California*, *supra*, 514 F.2d at 438. Here, however, as in *George Koch*, *supra*, 490 F.2d at 327:

> . . . there is not even an intimation or trace of connivance or such complicity . . . . Indeed, the extraordinary circumstances outlined earlier banish any suspicion of it. [General and Three Boro] had no motive to favor the arrangement with [the general contractors]. Indeed, it deprived [them] of profitable work.[8]

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[8] This is not, therefore, a situation in which the employer has attempted "to bind his own hands and thereby immunize himself from union pressure occasioned by his own employees' loss of work." *Local 742, United Bhd. of Carpenters (J. L. Simmons Co.)* v. *N.L.R.B.*, 444 F.2d 895, 899 (D.C. Cir., 1971). Where such facts do appear, the Board has refused to treat the pressured employer as a neutral regardless of his lack of the "right to control" the work.

As noted, the Board's right-to-control approach has been accepted by the Fourth and Ninth Circuits. Prior to the Supreme Court's decision in *National Woodwork* this Court viewed as relevant to a section 8(b)(4) violation, inter alia, a contractor's lack of control over the work demanded by the Union. See *N.L.R.B.* v. *Enterprise Ass'n, Local 638*, 285 F.2d 642, 646 (2d Cir. 1960). To our knowledge, however, since *National Woodwork* this Court has not considered a case where a contractor's lack of control was the prime index of its secondary status. The District of Columbia Circuit, in a recent five to four majority, disagreed with the Board's approach. *Enterprise Ass'n, Local 638, Plumbers and Pipefitters (The Austin Company)*, 521 F.2d 885 (D.C. Cir. 1975), (*en banc*), *petition for certiorari granted*, 44 U.S.L.W. 3462 (1976). (The majority and dissenting opinions in the D.C. Circuit's *Enterprise* case contain an extended discussion of the history of this issue). Subsequent to its *Enterprise* decision, the District of Columbia Circuit has pointed out that when, as here, a contractor's lack of control is but "one circumstance among many" indicating a contractor's neutral secondary status, mere reliance upon that factor does not thereby trigger the "right to control" dispute which divided the court in *Enterprise*. See *Local 644, Carpenters (Walsh Constr. Co.)* v. *N.L.R.B.*, —— F.2d ——, 91 LRRM 2141, 2149 (D.C. Cir. 1975), reh. den. —— F.2d —— (1976).

See, e.g., *Pipe Fitters Local No. 120, United Ass'n.*, 168 NLRB 991 (1967); *Painters District Council No. 20*, 185 NLRB 930 (1970).

And contrary to the view expressed by the D.C. Circuit in *J. L. Simmons Co., supra*, 444 F.2d at 901, the subcontractor is not "contracting away" bargaining unit work by signing the construction contract. For rather than "signing a contract that would deprive [unit employees of] work" (444 F.2d at 899), the employer is signing a contract to *provide* them as much work as is available on the project under the terms offered to him.

In the *Koch* case, *supra*, 201 NLRB 59, the Board pointed out limitations in the Supreme Court's *National Woodwork* decision which had previously been overlooked by some courts of appeals. Thus, the Board noted that *National Woodwork* merely establishes the right of employees, through their union, to direct "work preservation" pressure against *their* employer when *their* employer fails to assign them work they have traditionally performed. (Sec. 386 U.S. at 616-617 at n.3). The Court did not consider the question of what, if anything, the employees may do when some other employer controls assignment of the work they seek and fails to award it to them. (*Id.*).

Accordingly, the Board looked to other Supreme Court decisions for guidance in the latter situation. Taking its cues from the Court's decision in *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675 (1961); *Local 1976, Carpenters* v. *N.L.R.B. (Sand Door and Plywood Co.)*, 357 U.S. 93 (1958); and *N.L.R.B.* v *Local 825, Operating Engineers (Burns and Roe)*, 400 U.S. 297 (1971), as well as *National Woodwork*, the Board held in *Koch* that even union pressures undertaken for a genuine work preservation object are unlawful if they are directed against neutrals. The Board then reaffirmed its long-standing doctrine that if the pressured employer lacks the "right-of-control"—that is, if he is powerless to award the work the union seeks—then he is at least *prima facie* a neutral and is not properly subject to union pressures.

By thus reaffirming the importance of the "right-of-control", the Board, and the Fourth and Ninth Circuits have provided construction industry employers and unions with assurance that a practical, effective method of determining the legality or illegality of product boycotts will continue to be available. The need for maintaining such a reliable, understandable standard for effectuating the Congressional ban on secondary boycotts is imperative,

particularly in this industry. Secondary boycotts generally take place at times of substantial pressures on neutrals, employees and employers with widely varying interests. In the construction industry, the dispute cannot await litigation, for the project is completed long before formal proceedings are resolved. Therefore, all concerned need clear and unambiguous rules which enable the parties to recognize their rights and obligations. When such rules are available, problems are resolved without disruptive tests of economic strength and, indeed, usually without litigation. The Board's decisions in the right-of-control cases, by clearly recognizing that employers without power to assign the work generally may not be subjected to pressure, have provided such an understandable, effective standard.

In the present case the Administrative Law Judge correctly followed the right-of-control principles enunciated in *Koch*. His finding that Local 28 violated sections 8(e) and 8(b)(4)(i) and (ii)(B) by pressuring the subcontractors with respect to work to be done on Moduline units manufactured by Carrier clearly follows from the unquestioned fact that the work the Union sought to "preserve" never would be within the contractors' power to assign (JD 20-25).

In sum, while there is sufficient evidence in this record to establish a secondary objective without reliance on the subcontractors' lack of control over the disputed work, the evidence which reveals the powerlessness of General and Three Boro lends further support, and provides an independent basis for the conclusion that the Union's pressures against them were directed at changing Carrier's policies.

C. *Local 28's Application of Pressure To Carrier, the Manufacturer, Which Had No Contract With and No Duty to Bargain With Local 28, Evidences a Secondary Objective Rendering the Union's Conduct Unlawful.*

It is not disputed that Local 28 told Carrier officials several times that the Union would not permit the Carrier Moduline unit to come into New York. The Union view was that Carrier was required to "go along with the [SMACNA] agreement as written." (JD 24). Carrier was not bound by this contract, did not have a bargaining relationship with Local 28, and had no obligation under the Act to bargain with Local 28 over its contract demands. Despite these undisputed facts, the Board dismissed the relevant charges against the Union because in its view "[t]he [union's] statements were no more than reiteration of Respondent's position that it would not relinquish its rights under the collective bargaining agreement." (D&O 11).

In this context, the Board's opinion that there was no suggestion that the Union would attempt to enforce the contract by means other than those provided therein was wide of the mark. The Union's reliance on its contract rights are irrelevant with respect to a non-party such as Carrier. Indeed, the work restriction clauses of the contract only applies to "each Employer within the collective bargaining unit." (D&O 4). Moreover, as the Administrative Law Judge held (JD 20-24), not only did the Union's interpretation of these clauses violate Section 8(e), but also the Union's attempted enforcement through Joint Adjustment Board procedures constituted coercion within the meaning of section 8(b)(4)(ii)(B). See also pp. 30-32, *infra*.

The Board's holding in this regard is therefore inconsistent with the Board's own holding in *United Brotherhood of Carpenters, etc., Local 112 (Summit Valley In-*

dustries, Inc.), 217 NLRB No. 129, 89 LRRM 1799 (1975), petition *for review pending before the Ninth Circuit* (Case No. 75-2064). There the Board held that a union may protect its members' traditional unit work only by actions directed at their own employer. "Necessarily this envisages the existence of an established bargaining relationship between the union and the employer, or there will be nothing that can be preserved." *Summit Valley Industries, supra*, 217 NLRB No. 129, at JD 28. See also, *George Koch Sons, Inc.*, v. *N.L.R.B., supra*, 490 F.2d at 327.

The Union's effort to use its contractual relationships with various New York sheet metal contractors as a lever to force design and manufacture changes by Carrier, an independent business entity with whom the Union has no collective bargaining agreement or other contractual relationship, is precisely the type of tactic which the Supreme Court, in *N.L.R.B.* v. *Local 825, Operating Engineers (Burns and Roe, Inc.), supra*, condemned as secondary. 400 U.S. at 304. See also *George Koch Sons, Inc., supra*, 490 F.2d at 327, where the court pointed out that since "Koch and the Unions were not in privity . . . Koch, then was a neutral . . ."

A review of the Supreme Court cases cited by the Board in *Koch* clearly demonstrates the correctness of requiring a contractual relationship or bargaining obligation exist before a union may pressure an employer in support of a work preservation claim. Thus, in *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951), the Court held that the existence of a contract between the pressured employer and the employer whose policy the union seeks to change is of material significance, since the separate status of independent contractors is to be given full effect under section 8(b)(4). For as the Court explained (341 U.S. at 688-689, emphasis added):

> In the background of the instant case there was a long-standing labor dispute between the Council and Gould & Preisner due to the latter's practice of employing nonunion workmen on construction jobs in Denver. The respondent labor organizations contend that they engaged in a primary dispute with Doose & Lintner alone, and they sought simply to force Doose & Lintner to make the project an all-union job. *If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance* in their contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus disposed of the dispute. *However, the existence of the Gould & Preisner subcontract presented a materially different situation.* The nonunion employees were employees of Gould & Preisner. The only way that respondent could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract.

Sand Door, supra, 357 U.S. 93, adds the principle that "a violation of the secondary boycott provisions cannot be justified by a contractual arrangement between the union and the neutral employer." *N.L.R.B.* v. *Carpenters District Council of New Orleans*, 407 F.2d 804, 806-807 (5th Cir. 1969), cited with approval in *Burns and Roe, supra*, 400 U.S. at 305.

National Woodwork is to the same effect. The union pressures involved there were aimed at enforcing a work restriction clause against the union members' *immediate employer* (Frouge). Further, the Court's opinion repeat-

edly refers to the right of employees to engage in "activities to pressure *their own employers* into improving the employees' wages, hours and working conditions." The Court also stressed that the Congress did not mean to deprive employees of "the economic weapons traditionally used against *their employers'* efforts to abolish their jobs . . ." 386 U.S. at 641, 643 (emphasis added). As the emphasized language indicates, the Court was not endorsing pressures, for whatever object, against other business entities having no employment relationship with the members of the boycotting union.

National Woodwork further supports Petitioner's position in this case by implicitly recognizing (386 U.S. at 642-643) that the employees' right to a lawful "work preservation" agreement is a corollary to the employer's obligation to bargain about work assignments under *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). Where the pressured employer has no bargaining relationship with the Union, he owes no such duty regarding work assignments. Accordingly, pressure against him cannot be viewed as "addressed to the labor relations of the contracting employer vis-a-vis his own employees," but rather is "tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644) and therefore violates the Act. Cf. *Koch*, *supra*, 201 NLRB at 63 n. 22. Accordingly, the scope of the union's rights must be viewed as coextensive with the scope of the employer's duty. And since, under *Fibreboard*, the employer cannot violate the Act by contracting out what he has never had, similarly under *National Woodwork*, the employees cannot negotiate to preserve work the employer has never had. Thus, in the situation presented here, work preservation was simply not involved and there was no primary labor dispute.

The rule here advanced by the *amici curiae*, and heretofore adopted by the Board in *Summit Valley*, *supra*, 217 NLRB No. 179, results in no inequity to the Union.

For, although there may be some superficial appeal to the argument that a union with a valid work preservation interest must have some "primary" employer against whom it can exert pressure, the Act contains no such requirement. Instead, it clearly limits the union's right to exert pressure to situations in which it can do so without enmeshing neutrals. In fact, when the union's claim of deprivation of its members' traditional work runs against someone other than their own immediate employer, there can be no lawful "primary" pressure, because there is no "primary labor dispute." Any contrary ruling would result in complete obliteration of the separate status of independent contractors, in contravention of the principles established in *Denver Bldg. Trades, supra.* And while the unions might view that as a desirable result, Congress clearly felt otherwise. Indeed, when Congress undertook in 1959 to close loopholes in the secondary boycott laws which had been disclosed by *Sand Door* and other cases, it made it clear that it wanted *Denver* to "remain in full force and effect." Conf. Rep., H. Rep. No. 1147, 86th Cong., 1st Sess., p. 39 (1959), I 1959 Leg. Hist. 1433.

D. *The Assessment of Fines and the Cessations of Handling of a Boycotted Product, Even if Imposed Under the Guise of Contract Enforcement, Constitute Prohibited Secondary Restraint and Coercion.*

The Union implemented a boycott against Carrier Moduline units by relying on certain penalty provisions of the SMACNA agreement which subject "alleged offending" contractors to censure and fines commensurate with the loss which a selected group of members of SMACNA and the Union (the "Joint Adjustment Board") adjudge are sustained by the Union's members as a result of the contractor's work on the restricted product. The Board in this case, as in *AGC of California*, reasoned that such procedures were not coercive because the

Union merely "sought to enforce certain provisions of [its] bargaining agreement against a party to that agreement through peaceful means provided by the agreement and by no other means." (D&O 12). The Board, however, made no attempt to reconcile this conclusory statement with the Ninth Circuit's rejection of this opinion or with the practical realities of how such penalties operate in the construction industry.

It is to be expected that a subcontractor will be substantially influenced to refrain from working on a product if a portion of its remuneration must be paid to a union for work which was prefabricated elsewhere. The lost compensation from such a requirement will force the subcontractor either to forego any work on the project, or to attempt to convince the project architect, general contractor or manufacturer to change its business practices with respect to the prefabricated product. This Court and others have held that union reliance on such contractually-derived pressure constitutes "coercion" under section 8(b)(4), and manifests a "cease doing business object" which violates sections 8(e) and 8(b)(4)(B). See *Danielson* v. *Masters, Mates and Pilots (Seatrain Lines, Inc.)*, 521 F.2d 747, 753 (2d Cir. 1975); *Associated General Contractors of California* v. *N.L.R.B.*, *supra*, 514 F.2d at 438-439; *N.L.R.B.* v. *Int'l Brotherhood of Electrical Workers, AFL-CIO (Ets-Hokin Corp.)*, 405 F.2d 159, 162 (9th Cir. 1968) *cert. denied* 395 U.S. 921; *Acco Construction Equipment, Inc.* v. *N.L.R.B.*, 511 F.2d 848, 852 (9th Cir. 1975).[9]

Moreover, the Board's position reflects a view of the scope of section 8(b)(4)(B) in conflict with the prin-

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[9] These cases also recognize that contractual damage clauses such as those involved here do not constitute "judicial means," which are the only legal methods for enforcing even valid "work preservation" agreements. See *Orange Belt Dist. Council of Painters* v. *N.L.R.B.*, 328 F.2d 534, 537 (D.C. Cir. 1964).

ciple enunciated in *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675, 680 (1951), and reaffirmed in *Burns and Roe*, *supra*, 400 U.S. at 303-304, that it is "sufficient [for a section 8(b)(4)(B) violation] that an objective . . . although not necessarily the only objective," be secondary.

Thus, for example, in the present case, the Union was willing in one instance to accept a cash payment from a contractor (General Sheet Metal) in lieu of performing work on the Presbyterian Babies Hospital. The Union does not even suggest that the payment went to the employees of General. It went instead into the coffers of Local 28, presumably for all members, very few of whom were employees of General. There is, therefore, no doubt that the assignment of the Carrier work to Local 28 members was at least one object of the Union's conduct. Moreover, the essence of the "settlement" of the Union's breach-of-contract claim against General was that the Union was accepting payment in lieu of its basic objective—a change in Carrier's design and method of manufacture of its products, and the assignment of that work to members of Local 28. The Union's continuing, fundamental goal was still to have the work performed in New York by journeymen sheet metal workers, rather than in Carrier's Texas plant. And, as previously noted on pp. 17 and 27, since that basic goal was tactically obtainable only by forcing a concession or change of policy by someone other than the subcontractors, the Union's objective "was unmistakably and flagrantly secondary" (*N.L.R.B.* v. *Local 825, Operating Engineers (Burns and Roe, Inc.)*, *supra*, 400 U.S. at 304), despite the possibility of a contractual damage award.

II. The Board Erred in Selecting an Interpretation of Sections 8(e) and 8(b)(4)(B) which is Inconsistent with the Congressionally Declared Policies Favoring Competition and Productivity

A. *The Board's Interpretation Would do Needless Violence to the Antitrust Laws and their Policies*

If the Board's interpretation of sections 8(e) and 8(b)(4)(B) were upheld, the effect would be to sanction, under the NLRA, conduct which is clearly in violation of the Sherman Act, i.e., a union-induced employer's concerted refusal to deal, *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*, 325 U.S. 797 (1945), and a single contractor's agreement with a union to not purchase services from other firms not organized by that union, *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975), where the restraint is not confined to the preservation of work for the contractor's own employees at his job sites.

Thus, the NLRA, as applied by the Board to products boycotts, would be plainly repugnant to the Sherman Act. Since a partial repeal of the Sherman Act is inferred if there is a "plain repugnancy between the antitrust and regulatory provisions . . .", *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975), quoting from *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1953), the Board's interpretation, in a Sherman Act proceeding, would require an inference of partial repeal of the Sherman Act to product boycotts. That is contrary to the result suggested by *Connell* and *Allen Bradley*, and it is clearly out of keeping with the rule that implied repeals of the antitrust laws are highly disfavored. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, *rehearing denied*, 411 U.S. 910 (1973); *United States* v. *First City Natl. Bank*, 386 U.S. 361 (1967); *California* v. *FPC*, 369 U.S. 482 (1962).

The Board's interpretation should be accepted therefore only if it is unavoidably dictated by the words of the statute or by its history. But, as the Supreme Court noted in *National Woodwork*, the words of the statute themselves would prohibit product boycotts in the form of work-preservation clauses, and, as the *Connell* case explained, the legislative history of the statute indicates an implied exception only to the extent of a work preservation agreement between an employer and his own employees, to preserve work for those employees at the employer's job site. Thus, neither the words nor the history of the secondary boycott provisions support a reading which would, as the Board's decision, bring these provisions, as applied to product boycotts into irreconcilable conflict with the Sherman Act. The Board's decision therefore should be overturned.

B. *The Board's Interpretation is Inconsistent with the National Productivity and Quality of Working Life Act of 1975*

The National Productivity and Quality of Working Life Act of 1975 (herein "productivity Act)[10] was a response by Congress to the declining rate of growth of United States productivity,[11] a fact found to have contributed to inflation, to economic stagnation and to increasing unemployment (15 U.S.C. 2401 (1) and (2). The Act declared that growth in productivity is essential to the social and economic welfare of the American people, to maintain and increase employment to stabilize the cost of living, and to provide job security (15 U.S.C. 2401 (4) and (5)). The Act therefore identified "national needs" relating to the productivity, including needs

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[10] 15 U.S.C. 2401, 89 Stat. 733, enacted November 28, 1975.

[11] "Productivity growth" is defined as including, but not being limited to, "improvements in technology" (15 U.S.C. 2404(3)).

"to identify and encourage appropriate application of technology to all sectors of American activity" (*Id.*, § 2401(1)), "to develop new technologies for the more effective production of goods and services" (*Id.*, § 2401 (15)), and "to identify, study, and revise or eliminate the laws, regulations, policies, and procedures which adversely affect productivity growth and the efficient functioning of the economy . . ." (*Id.*, § 2401(13)). The Act also expresses the conclusion that improved productivity and industrial peace would be fostered by the continued development of joint labor-management efforts to provide a healthy environment for collective bargaining (*Id.*, § 2401(8)).

To fulfill these needs, Congress declared that it is the continuing policy of the Federal government to use "all practicable means and measures" to stimulate a high rate of productivity growth" (*Id.*, at § 2403(a)), and ordained as follows: (*Id.*, § 2403(c)):

> the laws, rules, regulations and policies of the United States shall be so interpreted as to give full force and effect to this policy.

The Board's interpretation in this case of the secondary boycott provisions of the Act as applied to product boycotts would flout the findings and directives of the Productivity Act. One of the most important means of increasing productivity in construction is through the use of prefabricated and factory assembled products, which permit the utilization of more efficient methods and improved technology. In the construction industry, however, a builder seeking to utilize such progressive techniques nearly always must work through a general contractor and a variety of subcontractors, each with its own employees and its own labor relations. Often the contractors and subcontractors are parties to collective bargaining agreements containing so-called "work preservation" clauses. These agreements are typically nego-

tiated on an area-wide basis through local contractors' associations. They generally include vague, purposely expansive language regarding the types of work that must be performed on the job site by members of the building trades unions. Such clauses are often cited as justification for product boycotts—i.e., efforts by the unions to prevent the use of products they claim will eliminate work for the jobsite employees. If enforceable against subcontractors during the course of a construction project, such agreements obviously impose severe limitations on the ability of the project owners, designers and general contractors to utilize the methods and materials they deem most desirable. This is particularly so since in many areas there may be no available alternative to using union labor.[12]

Efficiency in construction thus depends, in large measure, on the elimination of product boycotts. Congress recognized the problem as early as 1947 when it included secondary boycott restrictions in the Taft-Hartley amendments. The legislative history surrounding the 1959 Landrum-Griffin amendments is unmistakable in showing that Congress, in amending section 8(b)(4) and enacting section 8(e) was attempting to close the loopholes that had developed in those restrictions. See, e.g., II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959. 1431 (Sen. Kennedy), 1568 (Cong. Griffin); Morris, *The Developing Labor Law* (1971), p. 57, 609-610.

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[12] The Fourth Circuit recognized the futility of the general contractor's attempting to find a subcontractor not bound by such a "work preservation" agreement in *Sachs* v. *Local 48, Plumbers*, 454 F.2d 879 (1972). The D.C. Circuit's assumption that a builder who wishes to use prefabricated materials "may seek another contractor not bound by such a restrictive union contract" (*Local 636, Plumbers Union* v. *N.L.R.B.*, 430 F.2d 906, 910 (1970)), thus ignores the realities of the construction industry in many areas.

The *amici* who have joined in this brief know from first-hand experience that effective enforcement of these statutory provisions is essential to permit technological growth and free competition in the construction industry. As designers and specifiers, they must have assurance that the products they believe necessary to the utility, economics and aesthetics of the projects on which they work can be used without arbitrary and artificial restrictions. As manufacturers they must be free to design and manufacture new and improved products that take advantage of advancing technology and increase productivity of construction labor. As contractors they must be protected from being caught between demands of designers and users to use factory built products and unions who would prevent their installation.

Effective protection against product boycotts leads to the essential goal of higher quality construction at lower cost. It is the responsibility of the *amici* to their clients and customers to achieve this end. This goal is beneficial to the public and is in harmony with governmental programs to reach the same result. Higher quality at lower cost is not obtainable, however, without a clear understanding that those who have the responsibility and bear the liability for the success or failure of the necessary new and improved products and techniques must have control over their use.

As specifiers they must determine whether a manufactured product should be used on a particular construction project. They are liable if they err. As manufacturers, they must furnish a product that meets specifications. Often they must supply warranties that it will do so. They are liable for any failure, as was Carrier in this case on the Police Office job (JD 7). As contractors they must install and place in operation the products specified. Also, they are liable if they do not perform according to instructions. All of the *amici* are continually

trying to achieve the highest possible safety standards in the design, manufacture, installation and use of products with which they deal. Both federal and state occupational health and safety laws have rapidly expanded, increasing their responsibility in this area. More accurate and effective tests to assure product safety can be performed in the factory than on the jobsite. When union restrictions force disassembly of a factory built component, approvals by authorities such as Underwriters Laboratory are invalidated.

When unions are able to set aside these obligations and interfere with the manufacturers control over the work to be performed, quality is lowered, prices are increased and productivity is impeded. The manufacturer is prevented from fulfilling his function and, frequently, must bear the liability for his inability to do so. Users and the public share the burden of higher costs and lower quality.

Congress made clear its intention to eliminate such union abuses when it enacted section 8(b)(4) and later amended it and added section 8(e). Congress did not intend to allow unions to use "contract enforcement" techniques to enforce product boycotts against secondary or neutral parties. On the contrary, the 1959 amendments manifested a clear recognition by Congress that such techniques are as inimical to the public interest as other forms of secondary pressure.

The Board, therefore, would have ruled consistently with both the NLRA and the Productivity Act had it affirmed the decision of the ALJ below. The Board erred in adopting an interpretation which is most at war with the Congressionally declared objective of enhancing productivity.

CONCLUSION

For the reasons stated above, the Board's dismissal of the section 8(e) and 8(b)(4)(i) and (ii)(B) charges against the Local 28 should be reversed. This Court should rule, as did the Administrative Law Judge, that Local 28 violated the hot cargo and secondary boycott sections of the Act.

Respectfully submitted,

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April, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4046

CARRIER AIR CONDITIONING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL-CIO,
Intervenor.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the Brief for Air-Conditioning and Refrigeration Institute, et al., as Amici Curiae in Support of Petitioner, in the above-captioned case have this day been served by certified mail upon the following parties:

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